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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 815

JOSEPH MORRIS, *Petitioner*,

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on November 27, 1959.

OPINION BELOW

No opinion was delivered in the United States Court of Claims. An order was issued by that Court, determining that, pursuant to 28 U.S.C. 1502, the Court of Claims lacks jurisdiction over plaintiff's claim, granting defendant's motion for summary judgment, and dismissing plaintiff's petition.

JURISDICTION

The Order of the Court of Claims was entered November 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). On February 20, 1960, the Supreme Court issued an order extending to March 24, 1960 the time within which to petition for certiorari.

QUESTIONS PRESENTED

The peace treaty between the United States and Japan waived petitioner's right to compensation from Japan for petitioner's property that Japan had taken for its use. Petitioner sued the United States on the ground that the United States, in order to make this treaty with Japan, had taken his property rights without compensating petitioner as required by the Fifth Amendment provision that private property be not taken for public use without just compensation. The Court of Claims dismissed petitioner's suit on the grounds that it lacked jurisdiction pursuant to 28 U.S.C. 1502, which provides that the Court of Claims shall not have jurisdiction of claims growing out of or dependent upon a treaty.

The questions presented here are:

1. Whether Congress, in providing that the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon a treaty, intended to preclude a claim for the taking of property rights by the United States incident to making a treaty with a foreign nation, where such claim is founded upon the Fifth Amendment's provision for just compensation when private property is taken for public use.

2. Assuming Congress intended to preclude such a claim, is such action by Congress constitutional?

STATUTES INVOLVED

Section 1502 of 28 U.S.C. which provides:

> Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

Article 14(b) of the Allied Peace Treaty with Japan:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

(Treaties and Other International Acts Series 2940)

Constitution of the United States, Amendment 5:

> . . . nor shall private property be taken for public use, without just compensation.

STATEMENT

Plaintiff, a citizen of the United States, was a resident of China, in the transportation business, at the time of Pearl Harbor. On December 8, 1941, the Japanese Government seized his movable property, valued at $125,000.00, and later issued him seizure receipts for it. These receipts provided for the return of his property after the cessation of hostilities. This property was never returned to him by the Japanese and when he made inquiry concerning it, he was informed by a Japanese official that his claim had been

waived by Article 14(b) of the Allied Peace Treaty with Japan.

Plaintiff sues the United States for a judgment in the amount of $125,000.00 alleging that the defendant deprived plaintiff of his right to compensation from the Japanese Government, by condemning such right in defendant's treaty with Japan, and that such condemnation was without the consent of and without compensation to plaintiff, in violation of plaintiff's rights under the Fifth Amendment of the Constitution.

REASONS FOR GRANTING THE WRIT

This case poses issues of substantial legal and public importance. The decision of the Court of Claims fails to perceive a vital distinction; that is, the distinction between *rights* and *violations of rights;* hence, the distinction between *rights* and *wrongs.* On the one hand, there is the situation of a claim growing out of or dependent upon a treaty in the sense that the *right* which is asserted grows out of and is dependent upon the existence of the treaty; in other words, a claim based on an assertion of a breach of a right where the *right* arises out of the provisions of treaty. On the other hand, there is a situation of a claim based on a *right* which pre-existed the treaty and where the treaty merely works a *violation of this right*; in other words, where the treaty sets up the *wrong* rather than the *right.* The latter is the situation involved in the case at hand. The claim is based on petitioner's *right under the Fifth Amendment* not to have his property taken by the United States for public use without just compensation, a right which existed before the making of the treaty with Japan, and which does not grow out of or depend upon the treaty because it grows out of

and depends upon the Constitution. The making of the treaty, with its provisions waiving the petitioner's vested rights against the Japanese Government, effects a taking of petitioner's vested rights without compensating him for this taking; and, hence, causes a breach of petitioner's pre-existing rights to just compensation for his private property condemned to a public use. The decision holding that petitioner could not make his claim for just compensation in the Court of Claims raises a fundamental issue of constitutional rights under the great charter of personal and civil liberties in the Fifth Amendment. Petitioner's claim to just compensation under the Fifth Amendment has been dismissed in the Federal District Court on the basis of the statutory provision that the District Courts shall not have jurisdiction of claims over $10,000.00. (28 U.S.C. 1346(a)(2)). If petitioner's claim is barred in the Court of Claims on the grounds it is a claim growing out of a treaty, even though it is a claim for the violation of a right, not founded on any treaty, to be justly compensated for a public taking, then there would be a frustration of a great constitutional protection and an important civil right.

The decision of the Court of Claims also raises important public and legal issues because it presents important questions in relation to the mechanics of treaty operations and the effect of exercising the treaty power. Many people have been, and may be affected by the making of treaties which have such provisions in them as those waiving valid vested claims of nationals against foreign nations. The officials of the United States Government responsible for the development of treaty relations, as well as the Houses of Congress responsible for effectuating treaties and for provision of funds to

pay just compensation awards, ought to be informed by an authoritative determination from this Court what the state of the law is as to requiring just compensation for a taking of private property incident to making a treaty.

Furthermore, the case at hand and the decision below touch upon broad issues of international law. The United States has been in the forefront of a movement to maintain at maximum effectiveness the rule of international law that nations should pay just compensation for expropriating property of aliens. See, for example, the article by the Legal Advisor of the State Department, Loftus Becker, "Just Compensation in Expropriation Cases: Decline and Partial Recovery," *Department of State Bulletin*, June 1, 1959, in which the official position of the United States is stated in the following words:

> But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equity and justice.

In this article, it is further pointed out that:

> In matters of policy even as in specific expropriation cases our Government has sought to advance these principles. In the course of the postwar treaty program it has followed a practice of negotiating long-term commitments on property protection that embody the classical rule of just compensation.

Now, if the United States, by treaty, relieves Japan of the obligation to compensate United States nationals for property expropriated by Japan, and evades the obligation under the Fifth Amendment to assume this obligation in place of Japan, this sets a strong precedent in the direction of discouraging a foreign nation from respecting the sanctity of the right to just compensation when it has taken an alien's property. It is a very serious and significant question whether Congress intended the provision in question, 28 U.S.C. 1502, to operate in such a way as to set an example of this country arranging with a foreign nation to completely deprive a United States national of any compensation for property rights which have been seized by the foreign nation.

In addition to the international law issues, the decision of the Court below raises important issues of national constitutional law in relation to international treaty engagements by the United States. Here are involved issues of the kind that were much mooted at the time of the debate on the so-called Bricker Amendment. These issues involve the question of the extent to which the United States can, by an exercise of the treaty power, free itself of obligations and restrictions stemming from provisions of the Constitution. In the current climate of the search for international peace and international order through such arrangements as the United Nations and the International Court of Justice, this type of issue becomes more and more important as affecting the power of the United States to adhere to such arrangements and as affecting the limitation upon the United States in joining such international efforts. Merely as an illustration of how this kind of issue is coming to the fore in the world of

today, with particular reference to the effect of the treaty power on the constitutional right to just compensation, there are cited two speculative but suggestive articles in recent issues of the *American Bar Association Journal:* Eberhard P. Deutsch, "Eminent Domain Under a Treaty: A Hypothetical Supreme Court Opinion," 43 ABAJ 699 (August, 1957); and Robert B. Ely III, "A Case Note: Eminent Domain Under a Treaty," 44 ABAJ 751 (August, 1958). In connection with these significant issues too, an authoritative opinion from this Court is necessary, as to whether Congress, in enacting 28 U.S.C. 1502, intended that an exercise of the treaty power should have the effect of depriving persons of a right under the Constitution; namely, the right to just compensation.

There is still another aspect in which the decision below raises a significant public legal question. If the decision below is correct, it constitutes a charge that Congress acted so as to deprive citizens of a forum in which to assert rights to just compensation granted by the Constitution. It says in effect that, although the Constitution enjoins the United States Government to pay just compensation to anyone whose property rights it takes for public use, the Congress has underhandedly flouted this mandate by the device of eliminating jurisdiction in any court to consider a claim for just compensation based on a taking in the course of making a treaty. Petitioner believes that the claim for just compensation in this kind of instance is established by the Constitution, not by the treaty; and that the making of the treaty merely establishes the violation of the Government's duty to pay just compensation. Petitioner believes that, correctly interpreted, 28 U.S.C. 1502 relates to claims where the *right*

which is asserted grows out of or is dependent upon a treaty. Petitioner also believes that it is a strained and wrong interpretation of 28 U.S.C. 1502 to extend it to cover claims founded on the constitutionally-granted *right to just compensation*, merely because the wrongful violation of the just compensation right came about in the course of making a treaty. Such a strained interpretation raises a grave issue of unconstitutionality, whether Congress can legally preclude the assertion of the right granted by the Constitution to just compensation. Whether that interpretation of 28 U.S.C. 1502 is permissible which suggests the serious charge that Congress has undercut constitutional rights, and which raises the grave issue of constitutionality of such action by Congress, is a question that this Court should settle.

I

The Court of Claims' decision working a deprivation of the constitutional right to just compensation results from the Court below mistakenly confusing two things: one, a claim for just compensation on account of property rights that the United States condemned in order to work out a treaty with Japan, and two, a claim founded on a right growing out of or dependent on a treaty. Defendant, in its pleadings below, quoted and cited a number of cases as showing why plaintiff's claim was barred on the grounds of growing out of a treaty. Each and every one of these cases cited by defendant illustrates a claim where the *right which is asserted* grows out of a treaty, and demonstrates that what is covered by the bar of 28 U.S.C. 1502 is a claim of a *right whose existence is based on a treaty* entered into by the United States with a foreign nation.

Thus defendant cites, and quotes extensively from, the case of *Great Western Insurance Company* v. *United States*, 112 U.S. 193 (1884), a leading decision in this Court on the interpretation of the statutory provision in issue here. This was a case where an insurance company brought an action in the Court of Claims to recover a portion of the money paid by Great Britain to the United States under the terms of the Geneva Award. Hence, it was a claim asserting a *right* in the fund of money generated under the operation of the treaty. There the claim was necessarily to a right growing out of and dependent on a treaty. In fact without the treaty, plaintiff would have no claim that it could assert against Great Britain at all. This is because the claim was based on the fact that Great Britain had caused injuries to American nationals, and hence was a mere tort claim. A tort claim against a foreign government is not a vested right, it is in the nature merely of a chose in action. It cannot be asserted without the consent of the foreign government to be sued, and the government of the person who has the tort claim does not have an international law right to secure compensation on behalf of its national from the foreign government. The only thing the national's government can do, under international law, is to bargain with the foreign government for a treaty recognizing the right of its national to compensation for the tort. This is precisely what happened in the *Great Western Insurance Company* case, and it is clear, hence, that the claim there asserts a right arising only out of the obligations and operations of the treaty running between the United States and Great Britain.

In the case at hand, by contrast, plaintiff's claim against Japan is for compensation for a seizure by Japan, the foreign government, of plaintiff's property. This is a vested right which, under international law, may be asserted against the foreign government without its consent. Under international law, the foreign government is obligated to compensate alien nationals for property which is seized or nationalized, and the government of the alien has the right under international law to attempt to secure compensation for such seizure. In the instant case, the Japanese Peace Treaty, far from establishing by treaty contract a national's entitlement to compensation from the foreign government, reflects a taking away of plaintiff's vested right to compensation from Japan in the process of exchanging inducements with Japan to enter into the treaty contract.

In the case of *Alling* v. *United States*, 114 U.S. 562 (1885), a second case from which defendant quotes extensively, the claim was also against monies paid to the United States by a foreign government, Mexico, under a treaty providing for an arbitration of claims by nationals. The plaintiff in *Alling* was, in fact, asserting that, by virtue of the operation of the treaty provisions, he was entitled to a larger share of the money paid to the United States under the treaty. Hence, he was clearly asserting a right growing out of the treaty.

In *Eastern Extension Telegraph Co.* v. *United States*, 231 U.S. 326 (1913), one of the issues was a claim that the United States, under the treaty with Spain ceding the Philippine Islands to the United States, had assumed certain obligations of Spain to pay plaintiff an annual subsidy. Again the claim in this aspect was

one of a right based on the terms and operations of a treaty.

In *Ex Parte Atocha*, 84 U.S. 439 (1873), this Court had before it a claim based on the fact that the United States had agreed, in a treaty with Mexico, to pay, on behalf of Mexico, $3,250,000 to Mexico's creditors in the United States. In ruling that this fell under the provision barring claims growing out of a treaty, this Court stated, at p. 444, that ever since that provision was enacted, the jurisdiction of the Court of Claims "applied only to claims made directly against the United States, and for payment [illegible] which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty." Thus, again, this Court pointed out that the claims which are barred are those asserting a *right growing out of a treaty*, such as the right to payment from the United States Government because it had, by treaty, assumed a debt liability of another government. Petitioner's claim, by contrast, is directly against the United States on a claim for the payment of which the United States is primarily liable, that is, a claim for payment of just compensation for confiscating defendant's property rights.

In *Warren Corporation* v. *United States*, 94 F. 2d 597, cert. denied, 304 U.S. 572 (1938), plaintiff was also asserting a claim depending upon the application and effect of a treaty, because he was asserting that a treaty gave him certain *rights* which the United States was violating. Likewise, in *Kinkead* v. *United States*, 18 C. Cls. 504 (1883), plaintiff's *right* to recover against the Government depended upon the terms of

a treaty, because claimant was suing for occupation by the United States of property to which they claimed title by a conveyance, the validity of which depended upon the terms of the treaty of cession of Alaska to the United States by the Russian Government. Plaintiff's property right here existed, if at all, by virtue of the treaty.

In *Falcon Dam Constructors* v. *United States,* 136 C. Cls. 358 (1956), the Court stated: "Our conclusion is that the plaintiff, . . . which contracted with Mexico, is suing the United States because the United States did not do what it agreed with Mexico to do." Thus, there, too, the claim asserts *rights* which arise, if at all, out of the terms and operation of a treaty, that is, out of the obligations which the United States assumed by agreement with Mexico.

Sioux Tribe of Indians v. *The United States,* 97 C. Cls. 612 (1942), also cited by defendant, did not in any way involve 28 U.S.C. 1502.

In all the above-cited cases where a claim was barred on account of 28 U.S.C. 1502, the claim involved *rights* founded on a treaty. In the case at hand the rights existed before the treaty, and the execution of the treaty had the effect of *violating the rights,* which is quite a different proposition from rights resting on a treaty.

In considering whether a claim grows out of or is dependent upon a treaty, it is necessary to consider whether the *right* which the claim asserts grows out of a treaty. That this is so has been unequivocally recognized by this Court. Thus in *United States* v. *Weld,* 127 U.S. 51 (1888), there was a suit for distribution of a sum of money out of the Geneva award, a

fund of money arising out of the operation of the treaty of Washington concluded between the United States and Great Britain in 1871. In response to the defense by the United States that this was a claim growing out of and dependent upon the treaty of Washington, this Court pointed out at pp. 56-57: "The claimant in this case does not seek to recover upon any supposed *obligation* created by the treaty of Washington, but upon the specific appropriation made in the act of June 2, 1886." [Italics supplied.] Then this Court went on to make the following statement:

> It may be said in opposition to this view of the case that, had there been no treaty of Washington, there would have been no fund of $15,500,000 to distribute, the act of June 5, 1882, would never have been passed, and therefore that the treaty is the basis of this claim; in other words, that, therefore, this claim is "dependent upon, and grows out of" the treaty of Washington. We are of the opinion, however, that such a dependency upon, or growing out of, is too remote to come within the meaning of section 1066, Rev. St. In our view of the case, the statute contemplates a direct and proximate connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the court of claims by section 1066, Rev. St. In order to make the claim one arising out of a treaty within the meaning of section 1066, Rev. St., the right itself, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation. (P. 57)

Likewise, in petitioner's claim, he is not seeking to recover upon any supposed obligation created by the treaty with Japan, but upon the right, created by the

Constitution, to just compensation for any taking of his property for public use.

In the *Weld* decision, this Court distinguished the *Great Western Insurance Co.* and the *Alling* cases, as follows:

> "In the first case cited, by the allegations of the petition itself, the claim was declared to grow directly out of the treaty, and was thus clearly dependent upon it. The petition based the right of recovery on the provisions of the treaty itself. No statute was invoked, nor was it charged that the United States was directly and primarily liable on the claim. In the language of the court below, which we approve: 'In that case the claimant corporation was not seeking to recover under any law of congress, but was attempting to enforce an alleged implied *assumpsit* on the part of the United States, growing out of and dependent upon the treaty of Washington, notwithstanding the laws of Congress, which expressly excluded its claim from consideration and from payment out of the fund in controversy. Instead of founding its claim on any law of Congress, as do the present claimants, the company invoked the jurisdiction of this Court to set aside and annul the statute provisions.'
>
> The *Alling Case* is, in principal, the same as the *Great Western Insurance Case*. In that case the claim on which the suit was based was alleged in the petition to be founded on a treaty stipulation. It had been submitted to the commission authorized and created in accordance with the provisions of the treaty of July 4, 1868, between the United States and Mexico (15 St. 679) for the adjustment of claims of the citizens of the respective countries against the government of the other for injuries to persons and property, and the award of that commission was that the Mexican government

should pay to the United States on account of the claim a specific sum of money out of which the United States might retain a certain amount on account of certain duties originally paid by claimants but subsequently refunded to them by the United States. The claimants having received the sum specifically awarded to them by the commission, and having been refused the sum retained by the United States, on account of the duties aforesaid, by the secretary of the treasury, brought an action in the court of claims to recover the amount of said duties. This court held that the court of claims had no jurisdiction to entertain such a suit, and ordered the dismissal of the petition, because the claim was founded on and grew out of the treaty with Mexico, and was therefore clearly within the provisions of section 1066, Rev. St. U. S. The reason of the ruling by this court in that decision is plain. The claim there in controversy was expressly recognized as a specific claim by the commission organized under the provisions of the treaty with Mexico, and was, therefore, dependent upon the treaty, and grew directly out of it."

The Court of Claims, which made the decision below, has itself applied the principle and the words of this Court's *Weld* opinion. In *The Eastern Extension, Australasia and China Telegraph Company* v. *The United States*, 46 C. Cls. 646 (1911), there was a suit for the use by the United States of cable lines in the Philippine Archipelago after the United States had assumed sovereignty over the Philippines from Spain pursuant to the treaty of cession. The Court said (p. 651):

> True, but for the cession of the territory the claimant would have no standing against the United States. But, as was said by the court in the case of *United States* v. *Weld* (127 U.S. 51, 57), "In

> our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims by section 1066, Revised Statutes. In order to make the claim one arising out of the treaty within the meaning of section 1066, Revised Statutes, the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." [Italics by Court of Claims.]

The Court of Claims then went on to say:

> As there is no stipulation for the assumption by the United States of the claim herein or of the colonial obligations or debts of the Spanish Government upon which *the right* itself can be based, it can not be held that the claim herein *had its origin under or derives its life and existence from* any stipulation in the treaty though protected from impairment by Article VIII. [Italics supplied.]

And then at p. 652:

> From this it may fairly be said that the claim does not arise out of or depend upon the treaty, although but for the treaty no such claim could have arisen.

In affirming this decision of the Court of Claims, *Eastern Extension, Australasia and China Telegraph Company* v. *United States*, 231 U.S. 326 (1913), this Court said concerning the provision barring claims growing out of a treaty (p. 333):

> It is its evident purpose that the *obligations* of the United States *directly resulting from a treaty* should not be determined by the court of claims. [Italics supplied.]

Legally, the term *obligation* bespeaks the *duty* which is the correlative of the *right*. It is to be distinguished from the concept of the acts which *violate the right* or *breach the duty*. This distinction lies at the heart of the legal issue in this case.

In another connection, the Court which made the decision below has previously applied the principle and the words of this Court's *Weld* opinion. This is in considering Indian claims cases, where the Court of the Claims is given special jurisdiction to determine claims arising under or growing out of any treaty or agreement between the United States and the Indians. Thus in *Creek Nation* v. *The United States*, 63 C. Cls. 270 (1927), in determining that the claim asserted by the Indians was not one arising from the treaty between the United States and the Creek Nation and hence not one that the Court of Claims could consider, the Court, by way of analogy alluded to the provision barring claims growing out of or dependent upon any treaty, and quoted this Court's words in *Weld*: "In order to make the claim one arising out of a treaty within the meaning of section 1066, Revised Statutes (153 Judicial Code), the right itself, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." (P. 272).

II

The serious issues of international law and national constitutional law which are posed by the decision below with respect to the mechanics and exercise of the treaty power also arise, petitioner believes, as a result of an erroneous legal interpretation, in the form of a con-

fusion between the process of making a treaty and the operations under a treaty.

This confusion is exhibited in the following assertion from Defendant's Response to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (p. 3):

> His [plaintiff's] property was not taken by the United States. The only link between his claim for missing property—confiscated by the Japanese Forces in China—and the defendant here is Article 14(b), and Article 14(b) is part of a *treaty*. If the treaty provision is removed from consideration, plaintiff's whole connection with this claim in this Court against the United States is severed.

This does not view plaintiff's claim against the United States in its proper light. Plaintiff is not claiming that the United States took his missing property, the trucks, automobiles and gasoline. Plaintiff is claiming that the United States confiscated his vested rights to compensation from the Japanese Government for the property seized by the Japanese Forces in China, rights to compensation evidenced by the certificates that the Japanese Forces gave to the plaintiff. The link between plaintiff's claim for missing property and the defendant is not Article 14(b) of the treaty; the link is the execution by the United States of the treaty. The link is not the operation of the treaty under Section 14(b), but the actions of the United States in taking plaintiff's rights and using them for purposes of arriving at the international bargain with Japan expressed in the treaty. True, if Section 14(b) of the treaty is removed from consideration, plaintiff would not have a claim such as he is asserting. But this is only because, if Section 14(b) is eliminated from consideration, then there would have been no taking by the

United States of plaintiff's rights in the first place. To be sure, if there had been no taking, there would be no claim. Conversely, it should be clearly recognized that plaintiff's claim is for the taking, not for any *rights* arising out of Section 14(b).

Section 14(b) merely reflects the change in legal rights brought about by the Government's taking. It reflects the divestment of plaintiff's right to compensation from the Japanese Government, and the transference of this right to the United States for use in making the treaty contract with Japan. The taking which works this transfer of rights is separate from, and precedes, the changed legal status which results from the taking. Thus in an ordinary taking of private property by the Government, there is first the taking, and then the change in legal rights to the property which is the permanent result of the taking. In the case at hand, just as in an ordinary exercise of eminent domain, the plaintiff is suing for due compensation for the taking.

The Government really is trying to say that the legal effects of a taking are part of the taking, that the taking is not complete until after title has changed to the Government, and hence that Section 14(b) is part of the act of taking plaintiff's right to compensation from the Japanese Government. If this were so, then the Government would never need to pay for a taking of property. For, if the change of title were part of the taking, it could always argue that when the taking was consummated the title to the property was already in the Government, and why should the Government pay for its own property. Plaintiff's claim is for the making of the treaty and the taking incident to that.

Section 14(b) merely reflects the changed legal status resulting from the taking, which taking was complete and consummated at the moment of ratification of the treaty, before a single moment of operation took place under the treaty. When there is an exercise by the Government of eminent domain, what a person is entitled to is compensation for the taking without reference to the title or legal status after the taking. The legal incidents and provisions after the taking do not in any way affect the right to compensation for the act of taking. The plaintiff here is suing for a taking of his rights, and the issue is: was there a taking or not. If there was a taking, it took place in the time span before the treaty went into operational effect, in the time span leading up to the treaty's going into effect. Plaintiff's suit here is not a claim for money coming due allegedly under the operation of the treaty provision, Section 14(b).

The taking of plaintiff's right is really an act separate and distinct from the treaty and the carrying out of the treaty. The suit here is for the taking, regardless of what the taken rights are used for. The treaty obligation, Section 14(b), is merely the purpose for which the taking was made. The taking is an act separate and distinct, in legal contemplation, from the motive or purpose of the taking or the use to which the property taken by the government is put. So, the taking of plaintiff's rights in order to throw them into the international bargain and contract with Japan, is a separate and distinct legal manifestation from the use made of the rights that have been taken and from the legal incidents that flow out of the use made of the rights, that is, the legal effect of Section 14(b).

That Section 14(b) prevents the plaintiff from asserting his claim against Japan, and entitles Japan to refuse plaintiff's claim, merely reflects the change of legal rights brought about by the United States Government's taking. The plaintiff is not claiming on the ground that the legal rights have been given to the Japanese Government to refuse to honor his compensation claim. He is suing because of the taking which made possible this conferral of legal rights on the Japanese Government, and which took place necessarily before these legal rights vested in the Japanese Government and were divested from plaintiff. This change in legal rights could not have come about except by a preceding alteration by the Government of plaintiff's legal rights. It is for this alteration of plaintiff's rights, this divestment of his rights, not for the vesting of rights in the Japanese Government, that plaintiff is suing. The going into effect of Section 14(b) in favor of Japan merely informs plaintiff that there has been a preceding divestment of his rights by the Government. His claim for a taking is not founded on any treaty in existence at the time the taking was made. The taking, in fact, was to make the treaty possible. Before the United States could waive his rights over to Japan, it had to, conceptually, take them away from him.

Thus plaintiff's claim is for the taking involved in the process of the making of the treaty. It grows out of the acts done by the Government in order to have this treaty, in order to arrive at it. Plaintiff's claim looks to the past taking; the treaty itself looks to the future, to the change in legal rights embodied therein as a result of the taking. The taking for which a person is entitled to just compensation, in eminent

domain situations, is measured not as of the time after the title has gone from him to the Government, but as of the moment just before the title change occurs.

III

The interpretation of 28 U.S.C. 1502 inherent in the Court of Claims decision below, as has been pointed out above, raises a serious charge that Congress acted deviously to evade its obligation under the Constitution's Fifth Amendment to pay just compensation for a public taking of private property; and also raises the grave question of the constitutionality of a Congressional action to deprive persons of the possibility of asserting constitutionally-given rights. This is an unnecessary price to pay for an interpretation of 28 U.S.C. 1502, and the interpretation which exacts this price is a strained and unrealistic, as well as an unnecessary, one. There is a perfectly normal and reasonable interpretation available for 28 U.S.C. 1502, which gives it the scope to accomplish all that Congress would have wanted to accomplish by it. This is the interpretation that it meant to bar any claims against the United States *founded on rights coming into existence by virtue of a treaty* that the United States has seen fit to enter into with another nation.

The whole sense of the provision is to ban *claims of rights alleged to come into existence* because of the provisions of a treaty the United States has entered into. It reflects the basic international law concept that treaties are an exchange of legal rights and obligations between nations, and for the benefit of nations not individuals. And it reflects a common sense desire on the part of Congress to say that, when the United States enters into a nation-to-nation exchange of legal

rights and obligations, no rights should be conferred by this against the United States in favor of private individuals. This is the evident sense of this Court's words quoted above, *Eastern Extension, Australasia and China Telegraph Company* v. *United States, supra*, when it said about the provision barring treaty claims: "It is its evident purpose that the *obligations of the United States directly resulting from a treaty* should not be determined by the court of claims." [Italics supplied.] In other words, the obligations of the United States running to other nations, as established in international treaty contracts, should not be the subject of suits in the Court of Claims by private persons asserting rights against the United States.

In short, treaty-making is for public purposes not for private benefits. But this is hardly to say that persons are to be deprived of rights to just compensation under the Fifth Amendment for a taking of their property in the course of striking a treaty with another country. If the Government takes some property from an individual in the course of making a treaty, or takes some property from a person in order to fulfill the obligations of a treaty already made, this raises an entirely separate legal relationship between the Government and the individual, importing a right on the part of the individual to be compensated and a duty on the part of the Government to make just compensation, and arising not out of the treaty but out of the taking. Congress did not mean to say, in 28 U.S.C. 1502, that by making a treaty the United States could rid itself of its obligation to its people under the Constitution to pay just compensation for taking property in arriving at, or even in carrying out, the treaty.

The legislative history of the provision in issue is bare of any discussion as to the scope it was intended to have. It is to be noticed, however, that it bans claims growing out of or dependent upon any *treaty entered into*. This means that the claim must grow out of a treaty which has already been entered into, that is, which is already in existence; as distinct from a claim depending on a taking in the course of making a treaty.

It is defendant's acts *in the execution of the treaty* which are to be assessed to see if there was a taking of plaintiff's property; it is not the treaty which is to be assessed to see if plaintiff has a claim against the United States growing out of some provision of said treaty.

The decision below places an interpretation upon 28 U.S.C. 1502 which would make it cover cases where the claim is based on rights flowing from the terms and operations under a treaty, and also cases where the claim is based on a taking in the course of arriving at a treaty. Thus it would, in effect, rewrite the provision to read:

> the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations *or growing out of the making of any treaty*.

Whether this interpretation of 28 U.S.C. 1502, with the unhealthy effects alluded to before, is correct, is a question that this Court should settle.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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